Supreme Court, U.S.
FILED
NOV 29 1979
MICHAEL RODAK, JR., CLERK

No. 78-1455

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

EDGAR H. GILLOCK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. This case poses the question whether Rule 501 of the Federal Rules of Evidence encompasses an evidentiary privilege that bars the admission of evidence of a state senator's legislative acts in the context of a federal criminal prosecution. As we pointed out in our opening brief (Br. 20-24), the decisions of this Court reflect a purposeful unwillingness to create evidentiary privileges. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Respondent erroneously suggests that this substantial line of authority is irrelevant here because the decisions in question "did not address trial evidence and did not balance the same interests involved in this case" (Resp. Br. 20 n.12). To be sure, none of the decisions cited control the outcome of this case; nonetheless, they are instructive.

Thus, the Court has repeatedly rejected claims of privilege even when grounded in the Constitution itself. See, *e.g.*, *United States* v. *Nixon*, *supra*, 418 U.S. at 705-708, 711-713 (claim of Executive privilege based on Article II and the separation of powers doctrine); *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), slip op. 20 (editorial privilege based on First Amendment); *Branzburg* v. *Hayes*, *supra* (journalist's privilege based on First Amendment). Moreover, the policy disfavoring the creation and expansion of evidentiary privileges is particularly strong in the context of a criminal prosecution. See, *e.g.*, *United States* v. *Nixon*, *supra*, 418 U.S. at 712 n.19 (grand jury proceedings); *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 685-691 (grand jury investigation or criminal trial); *Roviaro* v. *United States*, 353 U.S. 53, 60-61 (1957) (criminal trial); *Clark* v. *United States*, 289 U.S. 1 (1933) (criminal trial). Accordingly, where, as here, the claim of privilege has no substantial constitutional underpinning[1] or other significant basis, there appears to be little justification for creating a rule that would withhold from the jury highly probative evidence of respondent's alleged criminal acts.

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[1]Respondent admits (Br. 8-9) that the Speech or Debate Clause does not protect or apply to state legislators. Furthermore, we have previously addressed respondent's claim that the legislator's privilege implicates the Tenth Amendment (Br. 44-52). Respondent fails to explain why in the context of a federal prosecution a state legislator is entitled to a privilege not enjoyed by a state judge or a state executive or how a federal prosecution of an individual state senator for conduct violative of state law interferes with an essential state function. Indeed, respondent acknowledges that there is no history of politically motivated federal prosecutions (Br. 35-36).

Respondent also relies (Br. 40-41) on the Republican Form of Government Clause of the Constitution (Art. IV, Sec. 4) and the Eleventh Amendment. These contentions are frivolous. The former provision simply grants Congress the nonjusticiable power "to decide what government is the established one in a State [and] * * * to decide [whether a] contingency ha[s] happened which require[s] the federal government to interfere." *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 42-43 (1849). Nothing could be further removed from the questions of evidence presented by this case. Indeed, one could as easily say, with regard to that provision, that federal prosecution of a corrupt state legislator in accordance with the congressional purpose underlying the Hobbs Act, 18 U.S.C. 1951, protects rather than undermines the republican form of government. Likewise, this prosecution does not implicate the Eleventh Amendment. In the absence of congressional authorization, the Eleventh Amendment bars individual citizens from suing a state-qua-state in federal court. It pertains neither to suits against individual state officials for their unlawful actions nor to suits by the federal government. See, *e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); *United States* v. *Raines*, 362 U.S. 17 (1960).

2. Relying on *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), and *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), respondent asserts that the "federal common law recognizes a speech or debate principle" (Br. 10-15). Respondent thus seeks to gloss over the substantial differences between those decisions and the issue raised by this case. *Tenney* and *Lake Country Estates* establish only that a state legislator, while acting in his legislative capacity, enjoys an absolute *civil* immunity from damages actions arising under 42 U.S.C. 1983. See also *United States* v. *Brewster*, 408 U.S. 501, 516 n.10 (1972). Neither case suggests that, for example, an aggrieved plaintiff may not introduce evidence of legislative acts in a civil suit in order to prove a legislator's unlawful, non-legislative conduct. Moreover, the civil immunity recognized in *Tenney* and *Lake Country Estates* does not parallel the protection accorded federal Congressmen by the Speech or Debate Clause in still another respect: Whereas federal legislators may not be enjoined for their legislative acts, their state counterparts may. Compare *Powell* v. *McCormack*, 395 U.S. 486, 501-506 (1969), with *Bond* v. *Floyd*, 385 U.S. 116 (1966). See, *e.g.*, *Jordan* v. *Hutcheson*, 323 F. 2d 597, 601-602 (4th Cir.

1963).[2] In sum, *Tenney* and *Lake Country Estates* do not support respondent's contention that a state legislator is entitled to an evidentiary privilege in the context of a federal criminal prosecution.

3. In our opening brief, we demonstrated that the evidentiary privilege associated with the Speech or Debate Clause exists only to protect the underlying immunity, and we accordingly argued (Br. 26-40) that where there is no underlying immunity, there is no justification for creating an evidentiary privilege. Respondent does not contend that he is immune from federal criminal liability. And although respondent asserts that there is no interrelationship between immunity and privilege, he neither cites any authority that has recognized an evidentiary privilege for legislators in the absence of an immunity regarding the legislative acts in issue[3] nor explains how the creation of

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[2]Respondent appears to suggest that this difference between civil immunity and Speech or Debate privilege is nonexistent (Br. 21-23). He fails, however, to distinguish *Powell* v. *McCormack*, *supra*, from *Bond* v. *Floyd*, *supra*. In both cases the question presented was whether a legislator had been unconstitutionally deprived of his seat. In *Powell*, the Court held that individual members of Congress could not be enjoined for wrongfully depriving Adam Clayton Powell of his seat. In contrast, the Court concluded in *Bond* that the individual state legislators should be enjoined from depriving Julian Bond of his position in the Georgia Lesiglature.

[3]Respondent erroneously suggests (Br. 18-19) that the Court reserved this issue in *United States* v. *Johnson*, 383 U.S. 169, 176-177 (1966). The passage quoted in respondent's brief states only that the Court has not addressed either a prosecution not involving legislative acts or a prosecution "entailing inquiry into legislative acts or motivations, [but] founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185.

such a privilege in the absence of an immunity advances the policies that underlie the tradition of legislative privilege.[4]

Finally, respondent's contention (Br. 19) that the government's position conflicts with the Court's decision in *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), is without basis. Our position is not based on any suggestion that a federal legislator who is properly indicted for non-legislative acts ceases to enjoy the evidentiary privilege associated with the Speech or Debate Clause. To the contrary, *Helstoski* and *United States* v. *Johnson*, 383 U.S. 169 (1966), make clear that, even in a wholly proper prosecution charging a non-legislative act, a Congressman may assert an evidentiary privilege. The privilege is limited, however, to those legislative acts that could not be the basis for an indictment and prosecution, even if such evidence is probative of the Congressman's non-legislative criminal

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[4]If a state senator has no federal criminal immunity, then he is subject to harassment, indictment, and trial by the hypothetical corrupt federal prosecutor notwithstanding the evidentiary privilege. Thus, insofar as the speech or debate privilege exists to protect a legislator from politically motivated prosecutions for legislative acts, recognition of respondent's claim of privilege serves little purpose. On the other hand, creation of a state legislator's privilege will interfere with the federal government's ability to convict corrupt state legislators.

In addition, respondent acknowledges (Br. 27-29) that his claim of privilege does not implicate the separation of powers doctrine that informs the Speech or Debate Clause. See, *e.g.*, *United States* v. *Helstoski*, No. 78-349 (June 18, 1979), slip op. 13; *United States* v. *Brewster*, 408 U.S. 501, 508 (1972); *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). He nonetheless argues that because a state senator is not a member of a coordinate branch of the federal government "[t]here is even a greater need for the privilege" (Br. 28). But a state senator's relationship to the federal government is no different from that of a state judge or a state executive and those state officials do not enjoy an evidentiary privilege similar to that sought by respondent.

conduct. The purpose is a prophylactic one to guard against any possibility that a Congressman could be punished on the basis of legislative acts. Thus, *Helstoski* and *Johnson* support our analysis, since even a federal legislator enjoys no evidentiary privilege regarding non-immunized (*i.e.*, non-legislative) acts. See also *Gravel* v. *United States*, 408 U.S. 606, 627 (1972). So too here, there is no reason to create an evidentiary privilege for acts as to which respondent enjoys no immunity.

For the reasons stated here and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979